Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

CHARLES C. PAVEY,
Of Counsel.

Supreme Court of the United States.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The Assistant Attorney General, in his brief on behalf of the United States (pages 7, 8, and 9), has given a wrong citation for the law under consideration in this case. His quotations are taken from the amended act of March 2, 1901 (31 U. S. Statutes, 940–942), instead of the original act of June 13, 1898 (30 U. S. Statutes, 448–451–458). The language of the two acts are identical so far as the particular quotations are concerned, but the amended act of March 2, 1901, had not yet taken effect when the plaintiff in error committed the alleged crime for which he was indicted. The error in the citation of the law is of no importance so far as the portions quoted are concerned, but the court cannot use

that citation to the volume and page of the statutes for their examination of the law itself. The correct citation is 30 U. S. Statutes, 448, 451, 458.

Part I.

The general principles laid down in Part I of the brief of the Assistant Attorney General (pages 10–21), entitled "Preliminary Points Applicable to Federal Tax Laws Generally," are not objectionable to the plaintiff in error, who would merely suggest the following criticism of the implied purpose of Points IV and VI:

Point IV is as follows (page 14):

"The selection of the means rests with Congress. Unless these means are forbidden by the Constitution the courts will not interfere."

This appears to suggest that the selection of the means of taxation in the case at bar rests with Congress. The reply of the plaintiff in error to this point is that *direct taxation without apportionment is a means forbidden by the Constitution*. His contention is that under the law in question a direct tax is laid without apportionment, and that therefore Congress has selected a means of taxation forbidden by the Constitution.

Point VI is as follows (page 18):

"In exercising the taxing power Congress may through classification select the subjects of taxation and thus use its discretion in distributing equitably the burdens of government."

This again appears to suggest that the selection of the subject of taxation in the case at bar is merely a matter of classification within the discretion of Congress. The reply of the plaintiff in error is that there is no question of classification involved in this case. If Congress has power to levy a tax without apportionment upon any kind of personal

property, there appears to be no reason why it may not select shares or certificates of stock as the kind of personal property upon which it will levy an unapportioned tax.

Part II.

The plaintiff in error has no criticism to make of the portions of the brief of the Assistant Attorney General contained in Part II (pages 22–32), entitled "Constitutional Provisions which Expressly and by Necessary Implication Absolutely Exclude Articles of Export and the Agencies and Instrumentalities of the Various State Governments from the Domain of Federal Taxation."

The contention of the plaintiff in error is that the same rules of construction which apply to the *exceptions or prohibitions* of the taxing power of the Federal Government apply equally to the *limitations* upon that taxing power.

Part III.

The portion of the brief of the Assistant Attorney General which directly bears upon the contention of the plaintiff in error in the case at bar is found in Part III (pages 32–41), entitled "Constitutional Limitations upon the Manner in which Congress May Impose Any Particular Tax."

The Assistant Attorney General very properly says (page 34) that "whatever may be the precise meaning of the phrase 'direct tax' as understood and used by various writers on the subject of political economy, it is only necessary to an intelligent discussion of the validity of the law under consideration to ascertain and determine what is understood by the phrase 'direct tax' *within the meaning of the Constitution*." He sets forth the only direct taxes within the meaning of the Constitution which have been decided to be such by the opinions of this court (pages 35–36).

From 1789 to 1896 only two taxes had been recognized by this court as direct taxes—a capitation or poll tax and a tax on lands. From 1896 up to the present date three other taxes have been recognized by this court as direct taxes. The Assistant Attorney General defines these three taxes in the following language (page 36):

"3. A tax upon *all* one's personal estate by reason of one's general ownership thereof.
"4. A tax on the income of real property.
"5. A tax upon the income of personal property."

These three taxes were declared to be direct taxes in the case of Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429; 158 U. S., 601.

In order to escape from the force and effect of the decision in the second Income Tax Case (158 U. S., 601), the Assistant Attorney General endeavors to limit the scope of that decision, that a tax upon personal property is a direct tax. The limitation which he would put upon the scope of that decision is indicated by his insertion of the word "all" in his definition of direct tax No. 3, and stated in the following language (page 36):

"*True Scope of the Second Income Tax Case.*

"We maintain that the true scope of the second Income Tax Case in so far as it holds that a tax on personal property is a direct tax within the meaning of the Constitution refers simply to a tax imposed upon *all one's personal estate solely because of one's general ownership of such personal property*, and that this is apparent not only from the decision itself but from subsequent decisions of this court wherein the real meaning of that case in this particular was adverted to and made clear."

He defends this statement of his limitation of the scope of that decision by quotations from the argument of Alexander Hamilton in the Hylton case, from the opinion of this court

in the second Income Tax Case (158 U. S., 628), and from the opinion of this court in the case of Knowlton *vs.* Moore (178 U. S., 41–82). None of these quotations warrant the limitation of the scope of the second Income Tax Case to "*all*" one's personal estate.

The quotation from the writings of Alexander Hamilton is not an authority at all, because it was made by Hamilton in argument as an advocate in a case. Hamilton's comparative opinions as a statesman and as an advocate have been thus analyzed by this court in its opinion in the second Income Tax Case (158 U. S., 624, 625):

"Thus we find Mr. Hamilton while writing to induce the adoption of the Constitution, *first*, dividing the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second*, dividing the latter into *direct* and *indirect*, putting into the latter duties and excises on articles of consumption.

"It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time *all* internal taxes, except duties and excises on articles *of consumption*, fell into the category of direct taxes.

* * * * * * *

"Any loose expressions in definition of the word 'direct,' so far as conflicting with his well-considered views in the *Federalist*, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject."

Pollock *vs.* Farmers' Loan and Trust Co., 158 U. S., 624–'5.

The quotatiens from the opinions of this court in the second Income Tax Case and in Knowlton *vs.* Moore do not warrant the Assistant Attorney General in inserting the word "all" in his definition of direct tax No. 3.

In the quotation from the opinion of this court in Knowlton *vs.* Moore, cited by the Assistant Attorney General in his brief (page 39), the word "all" does not qualify the very

correct definition given by the learned justice who delivered that opinion. That definition was a tax imposed upon a person "*solely because of his general ownership of personal property.*" The word "general" qualifies "ownership" and not "property."

The contention of the plaintiff in error is that the tax in the case at bar is imposed on his shares or certificates of stock "solely because of his general ownership of such shares or certificates of stock."

The definition of the Assistant Attorney General of tax No. 3 cannot be accepted as a correct statement of the scope of the second Income Tax Case, because the case stated in this definition was not before the court in the Income Tax Case.

In the Income Tax Case the question before the court was whether the tax upon the income from personal property was or was not a direct tax. No question was before the court as to whether a tax on personal property must be "imposed upon all one's personal estate solely because of one's general ownership of such personal property" in order that it should be a direct tax. The court, in delivering its opinion in the second Income Tax Case, in answer to the argument that a tax upon personal property was difficult or impossible of apportionment, made use of the illustration that "all the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an apportionment be made according to the Constitution," and added that "personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions" (158 U. S., 628). But nowhere in the opinion in the second Income Tax Case did the court say that a tax on personal property must be levied on all the invested personal property of the country in order to become a direct tax. The court placed no limitation on its

decision that a tax upon personal property was a direct tax. The language of the court is as follows:

"Our conclusions may therefore be summed up as follows: * * *

"Second. We are of opinion that *taxes on personal property* or on the income of personal property are likewise direct taxes" (158 U. S., 637).

There is a further reason why this interpretation of the meaning of the decision of the second Income Tax Case can not be accepted as sound. If the Congress has power to levy without apportionment a tax upon some certain kinds of personal property and can escape the limitation of the Constitution unless it levies the tax "upon all one's personal estate by reason of one's general ownership thereof," it will practically have the power to levy an income tax upon the income derived from those certain kinds of personal property. The law in question in the Income Tax Case did not levy a tax upon the income derived from all one's personal estate. The law was filled with exemptions both as to amount and as to source of income. It was a particular instance of a law drawn for the purpose of taxing incomes derived from certain sources of property and work, and exempting incomes derived from certain other sources of property and work. This failure of Congress to levy the tax upon the incomes derived from "all one's personal estate" did not exempt the tax in question from the prohibition of the Constitution.

But if the question whether a tax upon personal property is a direct tax is to be determined by the test as to whether it is levied upon all one's personal estate, the Income Tax decision can be practically nullified by Congress. It can tax certain kinds of personal property specified in the law and measure the tax by the amount of the income derived from that property. There will be no limit to the number of kinds of personal property upon which an unapportioned

tax *measured by income* can be imposed, so long as the tax is not imposed "upon all one's personal estate solely because of one's general ownership of such personal property." It cannot have been the deliberate intention of this court to place an interpretation upon its decision in the second Income Tax Case which will open the door for such an absurd nullification of that decision.

The Assistant Attorney General further urges that a tax on shares or certificates of stock would be subject to the difficulty, if not the impossibility, of apportionment. This objection is of no force whatever. If it was the intention of the limitation in the Constitution to prevent a tax being laid without apportionment on shares and certificates of stock, the difficulty or impossibility of apportioning such a tax is no argument against the application of the limitation. In fact it is an argument in its favor, because the framers of the Constitution doubtless intended by the limitation to make such a tax so difficult of enforcement that it would never be laid.

Part IV.

In this part of his brief the Assistant Attorney General presents eight "various theories upon which the law may be sustained as imposing an indirect tax or a tax in the nature of a duty or excise."

The first theory is as follows (page 44):

(A.)

"*The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court and the writings of leading authors on the subject of political economy.*"

In answer to this theory the plaintiff in error takes the position that he is not concerned with the writings of lead-

ing authors on the subject of political economy, and that his contention is simply and solely that the tax here imposed is a *direct* tax "within every difinition of that term contained in the many decisions of this court."

The second theory is as follows (page 49):

(B.)

"The tax here imposed is not a direct tax within the meaning of the Constitution for the reason that it is impossible to apportion it among the several States according to population."

There is no *impossibility* in the case. It is just as possible to apportion a tax upon the shares and certificates of stock among the States according to population as it is to apportion a tax upon land. There may be a resulting inequality in taxation or difficulty in collection, but that inequality in taxation or difficulty in collection would not be much greater in the case of stock than in the case of land at the present time. Moreover, this inequality in taxation and difficulty in collection is no argument that the tax is not a direct tax. In fact that very inequality of taxation and difficulty of collection were contemplated and intended by the framers of the Constitution, and that intention has been thus stated by this court in the decision of the first Income Tax Case:

"Nothing can be clearer than that what the Constitution "intended to guard against was the exercise by the General "Government of the power of directly taxing persons and "property within any State through a majority made up "from the other States. It is true that the effect of requir- "ing direct taxes to be apportioned among the States in pro- "portion to their population is necessarily that the amount "of taxes on the individual tax-payer in a State having the "taxable subject-matter to a larger extent in proportion to "its population than another State has, would be less than in "such other State, but this inequality must be held to have

"been contemplated, and was manifestly designed to operate "to restrain the exercise of the power of direct taxation to "extraordinary emergencies and to prevent an attack upon "accumulated property by mere force of numbers."

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 583.

"If in the changes of wealth and population in particular "States, apportionment produces inequality, it was an in- "equality stipulated for just as the equal representation of "the States, however small, in the Senate was stipulated for."

Pollock *vs.* Farmers' Loan & Trust Co., 158 U. S., 621.

The third theory is as follows (page 52:)

(C.)

"*The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.*"

This theory is defended by the Assistant Attorney General in the following language:

"It cannot be doubted that Congress has the power to declare that any person who shall engage in the business or occupation of buying and selling certificates of stock shall pay a tax measured by the price realized."

The answer to this theory is that an individual owner of shares or certificates of stock is taxed upon the sale of his own shares or certificates, although he is not engaged in the "business or occupation of buying or selling certificates of stock" within the decisions of this court.

This court has defined in the case of Warren *vs.* Shook (91 U. S., 704–710) who are engaged in the business or occupation of buying and selling certificates of stock in the following language:

"A broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securi-

ties for himself or for others. Ordinarily the term 'broker' is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally important as that which speaks of sales and purchases for others. All parts of the definition are qualified by the words 'whose business it is.' Thus if A. B. has $10,000 which he desires to invest and purchases United States stock or State stock or any other securities he does not thereby become a broker. Nor if he owns $10,000 of United States stock which he wishes to sell to raise money to pay his debts or because he is not satisfied with six per cent interest, is he thereby made a broker. It is only when making sales and purchases *is his business, his trade, his profession, his means of getting his living, or of making his fortune,* that he becomes a broker within the meaning of the statute."

Warren *vs.* Shook, 91 U. S., 704–710.

The fourth theory is as follows (page 54):

(D.)

"The law may also be defended on the theory that the tax imposed is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification."

The answer of the plaintiff in error to this theory is that this court has repeatedly held that the effort to levy a tax upon sales is a mere subterfuge, no matter in what form it is presented, and that a tax upon sales is in substance a tax upon the articles sold. The decisions of this court in support of this assertion are cited in the brief of the plaintiff in error.

The fifth theory is as follows (page 57):

(E.)

"*The tax here imposed may be sustained on the ground of its close analogy to the tax involved in the case of Hylton vs. United States* (3 *Dallas*, 171)."

The answer to this theory is stated by the Assistant Attorney General himself in the following language:

"In the Hylton case the tax upon carriages was held to be an indirect tax in the nature of a duty or excise levied *upon the use of the carriage.*"

If in the decision of this case this court shall hold that the law in the case at bar levies a duty or excise *upon the use of the shares or certificates of stock*, then the tax will have been sustained on a ground analogous to the tax in the case of Hylton *vs.* United States. But the Assistant Attorney General contradicts himself. In another portion of his brief the Assistant Attorney General makes a point in favor of the validity of the tax, that it is not a tax on the use of the shares or certificates of stock. On page 46 he says:

"The owner of the stock is entitled to the possession thereof for all time absolutely free from the operation of this law. He likewise enjoys all the rights incident to the ownership of such property free from any tax."

The contention of the plaintiff in error is that the tax in question in the case at bar is not a tax upon the use of the shares or certificates of stock, because the owner of the shares or certificates can use them and enjoy their dividends or other income. But when he comes to exercise one of the inherent attributes of property, namely, the right of sale and transfer, he must pay a tax which in form is a tax upon the sale, but in substance is a tax upon the shares or certificates themselves.

The sixth theory is as follows (page 59):

(F.)

"The tax here imposed may be sustained upon the theory that it is laid upon the privilege or facility afforded the owner of the stock under and by virtue of the laws of the State authorizing the formation of the corporation to sell and dispose of his property in the form of a certificate of stock."

This theory carries its fallacy on its face. The tax here imposed is not limited to a sale of the certificate of stock. It is not limited to the sale of the seller's property in the form of a certificate of stock; the law taxes the sale of *shares as well as certificates* of stock in a corporation. This duplication of language was undoubtedly used to prevent any evasion of the tax on a technicality. Corporations may be organized with shares of stock and not issue certificates of stock. Plainly it is the sale of shares upon which the tax is really laid, whether any certificates of stock have been issued or not. The law provides for a tax on the sale of shares where the "transfer is shown only by the books of the company."

The theory that the tax is laid upon the privilege or facility afforded the owner of the stock under the corporation laws of the State to sell his shares is untenable. That is a privilege which is not conferred on the owner by the corporation laws of any State. The privilege of *acquiring* shares in a corporation is conferred by the State laws, but not the privilege of *selling* them. The corporation laws of the States confer the privilege of organizing a corporation and give the holders of the shares the right to manage and direct the business of the corporation, with such liabilities, privileges, and immunities as the charter and the law provide. That privilege is what is known as the franchise of being a corporation. Once a cor-

poration is organized in accordance with the laws of any State, that franchise itself becomes property of the corporation. Like any other property, it belongs to all the holders of the shares; but every holder's individual shares in the corporation and in its franchises or other property are his personal property. Once he has acquired them, they are no longer a matter of privilege, but a matter of right. His rights to his shares as property are as fully protected by every constitutional guarantee for the protection of property, either under the Federal Constitution or under the State constitutions, as are his rights to land or any other property. *His right of sale and transfer is an inherent attribute of his property in his shares as well as in his other property.*

The seventh theory is as follows (page 65):

(G.)

"A tax similar to the tax here under discussion has been uniformly regarded by the legislative and executive departments of the Government since its foundation as an indirect tax within the meaning of the Constitution."

In support of this theory the Assistant Attorney General cites the fact that three such taxes have been laid:

1. A tax on certain certificates of stock (1797).
2. A tax on certificates of stock (1862).
3. A tax on the sale or agreement to sell certificates of stock (1898).

The same facts existed in the case of Fairbank *vs.* The United States, and a similar argument was made in favor of the constitutionality of the tax on export bills of lading which was declared unconstitutional in that case. In addition to the portion of the opinion in that case quoted by the Assist-

ant Attorney General, the plaintiff in error wishes to quote the balance of the same opinion upon that point:

"We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it can not be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution."

Fairbank *vs.* United States, 181 U. S., 311–312.

The eighth theory is as follows (page 67):

(H.)

"*And finally it is contended that an act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. A fortiori, is a law constitutional which merely taxes the sale or agreement to sell such property*" (page 67):

The plaintiff in error admits that if Congress may tax directly, without apportionment, all shares or certificates of stock in all corporations and associations, the law in question, which merely taxes the sale or agreement to sell such prop-

erty, is constitutional. The plaintiff in error contends that none of the decisions of this court sustain the right of Congress to levy a tax directly, without apportionment, upon shares or certificates of stock or any other property except with reference to either its production or its consumption. In other words, in the language of this court in the case of Patton *vs.* Brady (184 U. S., 608), all such taxes upon certain kinds of property have "reference to their origin or their intended use."

In Conclusion.

The plaintiff in error has cited the cases of Brown *vs.* Maryland, Welton *vs.* Missouri, Cook *vs.* Pennsylvania, Almy *vs.* California, Nicol *vs.* Ames, and Fairbank *vs.* United States, not for the purpose of suggesting that any of the taxes in those cases were held to be direct taxes, but solely for the purpose of showing that a tax upon sales has been uniformly held by this court to be a subterfuge and in substance a tax upon the articles sold. The plaintiff in error relies upon these cases to maintain the proposition that the tax upon sales of shares or certificates of stock is in substance a tax upon the shares or certificates of stock themselves. He relies upon the other authorities cited in the brief to show that shares and certificates of stock are property, and that the right of sale and transfer is an attribute of property, and that a tax upon property in the form of a tax upon one of its essential attributes is a direct tax within the meaning of the Constitution as defined in the second Income Tax Case.

Respectfully submitted.

Frank D. Pavey,
Walter J. Moore,
Counsel for Plaintiff in Error.

Charles C. Pavey,
Of Counsel.

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JAMES H. McKENNEY

Stamp Taxes on Sales of Shares or Certificates of Stock.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

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ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

CHARLES C. PAVEY,
Of Counsel.

C. G. Burgoyne, Walker and Centre Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 48.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

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ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

The above-entitled cause came on for hearing on the fourth day of December, nineteen hundred and three, the Chief Justice and all the Associate Justices being in attendance. There were present on behalf of the plaintiff in error Mr. FRANK D. PAVEY and on behalf of the United States Mr. MILTON D. PURDY, Assistant Attorney-General.

The case having been called for argument Mr. PAVEY addressed the Court on behalf of the plaintiff in error.

MR. PAVEY: The sole question in this case is the question of the constitutionality of that portion of the War Revenue Law which lays a tax upon the sales of shares or certificates of stock in any corporation, company or association. Our contention is that the tax is a direct tax within the meaning of the Constitution; that it has not been apportioned among the States; and that therefore it is unconstitutional.

It is not necessary for me to review or to restate the general rules of construction of the powers of taxation which have been granted to Congress by the Federal Constitution. There are two points which the Attorney-General makes to which I wish to reply at the opening of my argument and then I will state the grounds upon which we base our contention that the law is unconstitutional.

He has stated in his argument in the Chesebrough case (and it is in his brief in this case) that there is an inherent power of taxation in every sovereignty. We contend that that is not a true statement of the power of taxation in the Federal Government because it is a government of limited powers and those powers are only the powers that were granted by the Constitution. No matter how broad the power of taxation may be that is granted by the Constitution the Federal Government has no inherent powers of taxation by reason of its sovereignty. It gets all its power of taxation from the Constitution of the United States and from no other source. The author-

ity of Congress to impose any tax must be found and exercised within the terms and subject to the limitations of the Constitution.

There is another point which is made by the Assistant Attorney-General and as nearly as I can restate his language it is that some of the decisions upon which we rely have reference to the clause in the Constitution which says that no tax or duty shall be levied upon exports and that this Court has been justified in overthrowing the subterfuges by which the effort has been made to tax exports, whether in the form of stamp taxes on bills of lading or in any other form, upon the ground that, there being no power to tax exports, they could not be taxed either directly or indirectly.

We maintain that in that respect there is absolutely no difference between that section of the Constitution and the one upon which we reply. The parapraphs begin with exactly the same word—"No". There is no "yes" in it; it is "no". "No tax or duty shall be laid on articles exported from any State"—"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." One is just as negative and prohibitive as the other. Congress has no more power to lay a direct tax without apportionment than it has to lay a tax upon exports.

Therefore our contention in brief is that if Congress has resorted to some subterfuge by which it has

laid a direct tax with apportionment that subterfuge should be swept aside in this case just as well as in any other case. It has been repeatedly affirmed by this Court that the same rules of construction apply to the grant, to the prohibition and to the limitations upon the power of taxation.

The points of our argument are found on pages 11, 12 and 13 of the brief for the plaintiff in error.

JUSTICE BROWN: Does not that argument go to the extent of nullifying the whole stamp tax system, practically?

MR. PAVEY: No, not the whole stamp tax system, if Your Honor please. I think that it is an inevitable consequence of the decision of the Court in the Income Tax Cases that many of the stamp duties which prior to that decision were never challenged and were perhaps regarded, if they were regarded at all, as excises will as a matter of consistency and logical deduction from that decision have to be declared unconstitutional whenever they come before this Court on the ground that they are direct taxes and unconstitutional unless they are apportioned. However I do not think that applies to all stamp duties. Your Honor asked a question yesterday in regard to the difference between a tax on a deed and a tax on a bank check and I will use that stamp tax as an illustration of the distinction between the two classes of stamp taxes in answer to your question.

When this War Revenue Law was passed it laid a tax of two cents upon each check. Now, no one has to use a check. The great majority of the people in the United States get along very comfortably and live without using checks. They do not have to have bank deposits. It is purely a matter of convenience in business to have them. It is purely a matter of convenience in business to draw on bank deposits by check. There are a great many banks that do not permit checks at all; I refer to many savings banks. There are many savings banks which allow no checking whatsoever. You must bring your book and have the amount that is paid to you entered on the book. If the book is lost or stolen payments made to the finder or to the thief and entered in the book are valid against the depositor. There are other savings banks which have both systems. They allow you to draw by check and they allow you to bring your book and have the amount paid entered in the book.

If we look at the precise moment when this War Revenue Law was passed imposing the stamp tax on checks there was no bank whatsoever that could have refused to pay its deposits unless a check was presented with a stamp on it. There is nothing to compel a man to furnish a check to a bank in order to draw out his money. Any depositor in any bank in this country could have gone to the bank whether he was in the habit of using the check system or not

and make a demand for his money. If refused he could have sued and recovered judgment for his money and costs.

Therefore it seems to me that the stamp duty upon a check is an entirely different thing from a stamp tax upon the sale of shares or certificates of stock and that difference is more marked for another reason. This law levying this tax on the sale of stock does not merely levy the tax upon the sale of certificates of stock. In fact the real tax is levied on the sale of *shares of stock* because the law provides that the tax shall apply to the sale of shares whether any certificate has ever been issued or not by the corporation in which the shares are held. It distinctly provides that the tax shall apply in either event. I do not wish to do very much reading during my argument but if the Court will permit me I will read the language of the act on that point: It says that this tax shall be laid on "all sales or agreements to sell or memoranda " of sales or deliveries or transfers of shares or cer- " tificates of stock in any association, company or " corporation, *whether made upon or shown by the* " *books of the association, company or corporation, or by* " *any assignment in blank, or by any delivery, or by* " *any paper or agreement or memorandum or other* " *evidence of transfer or sale whether entitling the* " *holder in any manner to the benefit of such stock,* " *or to secure the future payment of money or for the* " *future transfer of any stock, etc.*" Then it provides

that if the transfer is shown only by the books of the company the stamp must be placed upon the books. If it is made by a separate instrument the stamp must be placed on that instrument. If it is made by the delivery of a certificate assigned in blank a memorandum of sale must be made and the stamp must be placed on that memorandum.

In the case of Nicol vs. Ames[1] this Court held that the requirement of a memorandum was merely a convenient means of collecting the tax; that it was not an essential element of the law which might have required each man who made a sale to make a monthly statement and declare the amount of his sales and pay the tax on the basis of that monthly statement with or without a stamp.

We contend that this law is unconstitutional in substance upon one ground but in form upon two general grounds. One is probably a little technical. We have tried to follow a logical argument based purely and simply upon decisions of this and other courts. The other is based upon a broad principle. We maintain that this law itself, this tax itself, if there had never been any decisions of this Court on the subject violates the true spirit and purpose of the Constitution as defined and interpeted in the Income Tax Cases.

The technical argument which I make is that a tax upon property is a direct tax within the meaning

[1] Nicol vs. Ames, 173 U. S., 509-523.

of the Constitution;[2] that shares and certificates of stock are property;[3] that the right of sale is an inherent attribute of property at common law and is so recognized by the courts of all the States and by the Federal courts as well;[4] that a tax upon the sale of articles has been uniformly held by this Court to be in substance a tax on the article sold and that when Congress had not the power to tax the article sold it could not escape that prohibition by laying the tax upon the sale of the article.[5]

This principle and rule has been sustained by this Court in a number of cases, the leading cases being Brown vs. Maryland, Welton vs. Missouri, Cook vs. Pennsylvania, Almy vs. California, Nicol vs. Ames, and Fairbank vs. The United States. In his reply to our brief the Assistant Attorney-General who has prepared a very elaborate review of all these cases fell into the error of thinking that we cited these cases to show that the taxes laid in these cases

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[2] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429, 583; 158 U. S., 601, 637. Constitution of the United States, Article 1, Section 2, Subdivision 3; Article 1, Section 9, Subdivision 2.

[3] Jellenik vs. Huron Copper Mining Co., 82 Fed. Rep., 778. Allen vs. Pegram, 16 Iowa, 163. Mattingly vs. Roach, 84 Cal., 207. Sargent vs. Franklin Ins. Co., 8 Pick., 90. Weaver vs. Barden, 49 N. Y., 286. 23 Am. & Eng. Enc. Law, 590. Cook on Corporations (4 Ed.), Vol. 1, p. 41.

[4] 1 Blackstone's Commentaries, 138. 2 Kent's Commentaries, 317, 320, 326. Bouvier's Law Dictionary—Property. Rutherford's Institutes, p. 20. Puffendorf's Laws of Nature, p. 220. Wynehamer vs. People, 13 N. Y., 396, 397. Sherman vs. Elder, 24 N. Y., 381. Toledo Bank vs. Bond, 1 Ohio St., 662. Exchange Bank of Columbus vs. Hines, 3 Ohio St., 8. Tod vs. Wick, 36 Ohio St., 385. Kuhn vs. Common Council, 70 Mich., 537. Arapahoe County vs. Printing Co., 15 Colo. App., 196. Commonwealth vs. Maury, 82 Va., 883. State vs. Kreutzberg, 114 Wis., 534. *In re* Marshall, 102 Fed. Rep., 324.

[5] Brown vs. Maryland, 12 Wheaton, 419, 444. Welton vs. Missouri, 91 U. S., 275, 279. Cook vs. Pennsylvania, 97 U. S., 566, 573. Almy vs. California, 24 How., 174. Nicol vs. Ames, 173 U. S., 509, 521. Fairbank vs United States, 181 U. S., 293.

were direct taxes. We cited them for no such purpose. We cited them solely and simply for the purpose of showing that this Court has rejected as a subterfuge every tax law which endeavored to tax through the medium of a sale that which it could not tax directly. Hence we maintain that this tax upon the sale of shares or certificates of stock is in substance a tax on the shares or certificates themselves and that therefore it is a tax upon personal property.

Formerly a distinction was drawn between shares of stock; some of the State courts holding that they partook of the character of the property of the corporation; that if the property of the corporation was real estate they were real estate and if the property of the corporation was personal property they were personal property. That distinction is no longer of any value because the general trend of opinion is that shares of stock are personal property. Whether that distinction exists or not the second Income Tax Case held that a tax upon personal property was a direct tax. We therefore maintain that this is a tax upon personal property; that it is a direct tax within the meaning of the second Income Tax Case; that it has not been apportioned among the States and that it is for that reason unconstitutional.

I will now refer to some of the points which the Assistant Attorney-General has made in reply to the argument in our brief.

In his brief on behalf of the Government he endeavors to draw a distinction as to what the second Income Tax Case meant which, I think, is entirely unwarranted either by that decision or by the subsequent interpretation which has been placed upon it. He points out the fact that from 1789 to 1896 only two taxes were clearly recognized by this Court as direct taxes; a capitation tax and a direct land tax. He then states that this Court in the Income Tax Cases defined three other direct taxes. The fourth and fifth—a tax on the income of real property and a tax on the income of personal property—do not concern us in this case. His third direct tax is defined as "a tax upon all one's personal estate by reason of one's general ownership thereof."

We maintain that the Assistant Attorney-General through a misunderstanding of certain expressions which have occured in the opinions of this Court has inserted the word *all* in that definition without any warrant or authority of law under the decisions of this Court. He bases his claim that the word *all* should be in the definition—in other words, that a direct tax must be a tax on *all* one's personal estate —upon—

JUSTICE HOLMES: What page is that?

MR. PAVEY: In the Attorney-General's brief pages 36 and 37 and in my reply brief pages 6 and 7.

He bases his claim upon quotations from the brief of Alexander Hamilton in the Carriage Tax

Case;[6] from the opinion delivered by Mr. Chief Justice FULLER in the second Income Tax Case;[7] and from the opinion delivered by Mr. Justice WHITE in Knowlton vs. Moore[8] in which he defined the scope of the decision in the second Income Tax Case.

The only one of his quotations which in any degree supports his claim is the quotation from the opinion of Alexander Hamilton which is quoted from Chief Justice FULLER'S opinion in the second Income Tax Case. That quotation from Hamilton was supposed to be taken from his brief in the Carriage Tax Case. Hamilton said:

"The following are presumed to be the only "direct taxes: capitation or poll taxes; taxes on "lands and buildings; general assessments whether "on the whole property of individuals or on their "whole real or personal estate. All else must of "necessity be considered as indirect taxes."

This Court expressed its opinion of that opinion of Hamilton's in that same Income Tax decision. It examined his writings when he was trying to induce the adoption of the Constitution and found that at that time he divided the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and divided the latter into *direct* and *indirect*, putting into the latter

[6] Hylton vs. United States, 3 Dallas, 171.
[7] Pollock vs. Farmers Loan & Trust Co., 158 U. S., 625-628.
[8] Knowlton vs. Moore, 178 U. S., 41-82.

duties and excises upon articles of consumption. The Court then said:

"It seems to us to inevitably follow that in Mr. "Hamilton's judgment at that time all internal taxes, "except duties and excises on articles of consump- "tion, fell into the category of direct taxes."[9]

Hamilton's comparative opinions as a statesman and an advocate were then analyzed by this Court in the following language:

"Any loose expression in definition of the word "'direct,' so far as conflicting with his well-considered "views in the Federalist, must be regarded as the "liberty which the advocate usually thinks himself "entitled to take with his subject."[10]

We maintain therefore that the quotation from Hamilton does not support the contention of the Assistant Attorney-General that a direct tax upon personal property must be levied upon all one's personal property or in other words that it must be a general assessment upon personal property.

The quotations from the opinions of this Court in the second Income Tax Case and in Knowlton vs. Moore do not warrant the Assistant Attorney-General in inserting the word "all" in his definition of a direct tax.

In the quotation from the opinion of this Court in Knowlton vs. Moore cited by the Assistant Attorney-

[9] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 624-625.

[10] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 624-625.

General the word "all" does not qualify the very correct definition given by the learned justice who delivered that opinion. That definition was a tax imposed upon a person "*solely because of his general ownership of personal property.*" The word "general" qualifies "ownership" and not "property." We contend that the tax in the case at bar is imposed on one's shares or certificates of stock "solely because of one's general ownership of such shares or certificates of stock."

Nor can the definition of the Assistant Attorney-General be accepted as a correct statement of the scope of the second Income Tax Case because the case stated in his definition was not before the Court in the Income Tax Case.

In the Income Tax Case the question before the Court was whether the tax upon the income from personal property was or was not a direct tax. No question was before the Court as to whether a tax on personal property must be "imposed upon all one's personal estate solely because of one's general ownership of such personal property" in order that it should be a direct tax. The Court in delivering its opinion in the second Income Tax Case in answer to the argument that a tax upon personal property was difficult or impossible of apportionment made use of the illustration that "all the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an

apportionment be made according to the Constitution" and added that "personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions."[11] But nowhere in the opinion in the second Income Tax Case did the Court say that a tax on personal property must be levied on all the invested personal property of the country in order to become a direct tax. The Court placed no limitation on its decision that a tax upon personal property was a direct tax. The language of the Court is as follows:

"Our conclusions may therefore be summed up "as follows: * * *

"SECOND. We are of opinion that *taxes on per-* "*sonal property* or on the income of personal property "are likewise direct taxes."[12]

There is a further reason why this interpretation of the meaning of the decision of the second Income Tax Case can not be accepted as sound. If the Congress has power to levy without apportionment a tax upon some certain kinds of personal property and can escape the limitation of the Constitution unless it levies the tax "upon all one's personal estate by reason of one's general ownership thereof" it will practically have the power to levy an income tax upon the income derived from those certain kinds

[11] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 626.

[12] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 637.

of personal property. The law in question in the Income Tax Case did not levy a tax upon the income derived from all one's personal estate. The law was filled with exemptions both as to amount and as to source of income. It was a particular instance of a law drawn for the purpose of taxing incomes derived from certain sources of property and work and exempting incomes derived from certain other sources of property and work. This failure of Congress to levy the tax upon the incomes derived from "all one's personal estate" did not exempt the tax in question from the prohibition of the Constitution.

But if the qustion whether a tax upon personal property is a direct tax is to be determined by the test as to whether it is levied upon all one's personal estate the Income Tax decision can be practically nullified by Congress. It can tax certain kinds of personal property specified in the law and measure the tax by the amount of the income derived from that property. There will be no limit to the number of kinds of personal property upon which an unapportioned tax *measured by income* can be imposed so long as the tax is not imposed "upon all one's personal estate solely by reason of one's general ownership of such personal property." It cannot have been the deliberate intention of this Court to place an interpretation upon its decision in the second Income Tax Case which will open the door for such an absurd nullification of that decision.

After endeavoring in this way to limit the scope of the decision in the second Income Tax Case to a general assessment or tax upon all one's personal property the Assistant Attorney-General presents eight various theories which he suggests as hypotheses upon which this tax may be sustained as an indirect tax or a tax in the nature of a duty or excise. I will briefly state and make replies to these various theories.

His first theory is that the tax is an "indirect "tax within every definition of that term contained "in the decisions of this Court and the writings of "leading authors on the subject of political econ-"omy."

So far as the leading authors on political economy are concerned we do not think their definitions ever have or ever will aid this Court in determining what is or is not a direct tax under the Constitution. We shall touch upon that point later in this argument. If the tax here imposed is an indirect tax within the meaning of every definition of the term contained in the decisions of this Court that proposition is his case and the opposite proposition is our case. So that his first theory is a mere statement of the question at issue.

His second theory is that "the tax here imposed "is not a direct tax within the meaning of the Con-"stitution for the reason that it is impossible to ap-"portion it among the several States according to "population."

We maintain that there is no such thing as an impossibility to apportion any tax whatsoever among the States. It may result in absurd inequality. It may result in a tremendous tax being imposed on one State and none falling upon another State. But it is just as possible to apportion a tax upon the shares and certificates of stock among the States according to population as it is to apportion a tax upon land. There may be a resulting inequality in taxation or difficulty in collection but that inequality in taxation or difficulty in collection would not be much greater in the case of stock than in the case of land at the present time. However great they may be this inequality in taxation and difficulty in collection are no argument that the tax is not a direct tax. In fact that very inequality of taxation and difficulty of collection were contemplated and intended by the framers of the Constitution. That result was one of the safeguards created by the insertion in the Constitution of the rule of apportionment. That result will defeat the purpose of Congress in laying a direct tax without apportionment.

His third theory is that "the tax here imposed " may be sustained on the theory that it is a tax in " the nature of a duty or excise upon transactions in " business activity or forms of commercial dealing."

This theory is defended by the Assistant Attorney-General in the following language:

"It cannot be doubted that Congress has the

" power to declare that any person who shall engage " in the business or occupation of buying and selling " certificates of stock shall pay a tax measured by " the price realized."

We answer to this theory that an individual owner of shares or certificates of stock is taxed upon the sale of his own shares or certificates—if only one—if he never owned but one—whether he is or is not engaged in the "business or occupation of buying or selling certificates of stock." This Court has defined who are engaged in the business or occupation of buying and selling certificates of stock in the following language:

" A broker is defined to be one whose business it " is to negotiate purchases or sales of stocks, ex- " change, bullion, coined money, bank notes, promis- " sory notes, or other securities for himself or for " others. Ordinarily the term ' broker ' is applied to " one acting for others; but the part of the definition " which speaks of purchases and sales for himself is " equally important as that which speaks of sales " and purchases for others. All parts of the defini- " tion are qualified by the words ' whose business it " is.' Thus if A. B. has $10,000 which he desires to " invest and purchases United States stock or State " stock or any other securities he does not thereby " become a broker. Nor if he owns $10,000 of United " States stock which he wishes to sell to raise money " to pay his debts or because he is not satisfied with

" six per cent. interest, is he thereby made a broker. " It is only when making sales and purchases *is his* " *business, his trade, his profession, his means of* " *getting his living, or of making his fortune*, that " he becomes a broker within the meaning of the " statute." [13]

His fourth theory is that " the tax imposed is in " the nature of a duty or excise upon the contract of " sale itself, referring only to the fact that the subject- " matter of the sale must be a certificate of stock as " the basis or ground for classification."

Our answer to this theory is that this Court has repeatedly held that the effort to levy a tax upon sales is a mere subterfuge no matter in what form it is presented and that a tax upon sales is in substance a tax upon articles sold. The decisions of this Court in support of this assertion are cited in the brief of the plaintiff in error.

His fifth theory is that " the tax here imposed " may be sustained on the ground of its close analogy " to the tax involved in the case of Hylton vs. " United States." [14]

The tax in the Hylton case was sustained on the ground that it was a tax upon expense or consumption. The Assistant Attorney-General himself defines that tax in the following language:

" In the Hylton case the tax upon carriages was

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[13] Warren vs. Shook, 91 U. S., 704-710.

[14] Hylton vs. United States, 3 Dallas, 171.

" held to be an indirect tax in the nature of a duty " or excise levied upon the use of the carriage."

We do not think any one will maintain that the sale of a share of stock is an expense or the consumption of the share. Nor is this tax a tax upon the use of the share or certificate of stock unless the Assistant Attorney-General consents to contradict himself. In another portion of his brief he makes the point in favor of the validity of the tax that it is not a tax on the use of the shares or certificates of stock. On page 46 he says:

" The owner of the stock is entitled to the posses- " sion thereof for all time absolutely free from the " operation of this law. He likewise enjoys all the " rights incident to the ownership of such property " free from any tax."

Our contention is that the tax in question in the care at bar is not a tax upon the use of the shares or certificates of stock because the owner of the shares or certificates can use them and enjoy their dividends or other income. But when he comes to exercise one of the inherent attributes of property—the right of sale and transfer—he must pay a tax which in form is a tax upon the sale but in substance is a tax upon the shares or certificates themselves.

His sixth theory is that " the tax here imposed " may be sustained upon the theory that it is laid " upon the privilege or facility afforded the owner of " the stock under and by virtue of the laws of the

" State authorizing the formation of the corporation " to sell and dispose of his property in the form of a " certificate of stock."

This theory carries its fallacy on its face. The tax here imposed is not limited to a sale of the certificate of stock. It is not limited to the sale of the seller's property in the form of a certificate of stock. The law taxes the sale of *shares as well as certificates* of stock in a corporation. This duplication of language was undoubtedly used to prevent any evasion of the tax on a technicality. Corporations may be organized with shares of stock and not issue certificates of stock. Plainly it is the sale of shares upon which the tax is really laid whether any certificates of stock have been issued or not. The law provides for a tax on the sale of shares where the " transfer is shown only by the books of the company."

The theory that the tax is laid upon the privilege or facility afforded the owner of the stock under the corporation laws of the State to sell his shares is not tenable. That is a privilege which is not conferred on the owner by the corporation laws of any State. The privilege of *acquiring* shares in a corporation is conferred by the State laws but not the privilege of *selling* them.

I must concede that the privilege of creating a corporation is a privilege granted by the statute law of the States. In the preceding portion of Schedule

A of this law a tax is laid on the issue of certificates of stock. As a matter of argument I am willing to admit that a tax upon the issue of certificates of stock is a tax upon a privilege. But that is a very different thing from a tax upon the ownership of shares because you may organize a corporation without certificates of stock.

I am willing even to admit that the privilege of *acquiring shares* in a corporation may be a privilege upon which Congress could lay an excise tax without apportionment. But the privilege of selling shares after one has acquired them from the corporation is not a creature of the State law at all. I doubt if you could find in the corporation law of any State a distinct provision giving to the owner of shares the right by statute to sell his shares. Certainly a corporation law which had no such declaration would not be defective for its purpose. The owner of the shares would have the right to sell regardless of any such declaration. If there is any State law which has that declaration in it I think it is merely a declaratory statute and declares a right of sale which the owner of the shares would have if no such declaration were in the statute.

The corporation laws of the States confer the privilege of organizing a corporation and give the holders of the shares the right to manage and direct the business of the corporation with such liabilities, privileges and immunities as the charter and the law

provide. That privilege is what is known as the franchise of being a corporation. Once a corporation is organized in accordance with the laws of any State that franchise itself becomes property of the corporation. Like any other property it belongs to all the holders of the shares; but every holder's individual shares in the corporation and in its franchises or other property are his personal property. Once he has acquired them they are no longer a matter of privilege but a matter of right. He owns them in his own right just as he owns cattle or land. His rights to his shares as property are as fully protected by every constitutional guarantee for the protection of property either under the Federal Constitution or under the State constitutions as are his rights to land or any other property. *His right of sale and transfer is an inherent attribute of his property in his shares as well as in his other property.*

His seventh theory is that "a tax similar to the "tax here under discussion has been uniformly re- "garded by the legislative and executive departments "of the Government since its foundation as an in- "direct tax within the meaning of the Constitu- "tion."

I admit that that is true. The Assistant Attorney-General cites the fact that three such taxes have been laid by Congress without apportionment:

1. A tax on certain certificates of stock (1797).
2. A tax on certificates of stock (1862).

3. This tax on the sale or agreement to sell certificates of stock (1898).

The same facts existed and the same argument was made in the case of Fairbank vs. The United States. In three instances stamp taxes had been laid upon bills of lading for exports. They had never been challenged before but when they came before this Court in the case of Fairbank vs. The United States the Court properly said that in cases of doubt due consideration was to be given to the construction which had been placed upon the Constitution for so long a period of time by the legislative and executive branches of the Government but that that consideration could not override the clear meaning of the purpose and spirit of the Constitution.

The Assistant Attorney-General quotes from the opinion of the Court in the case of Fairbank vs. The United States to show that the Court will admit that actual construction to settle questions of doubt. I quote from the same opinion to show that although that actual construction had been applied by Congress to stamp taxes on export bills of lading this Court rejected the tax as an unconstitutional subterfuge:

"We have no disposition to belittle the signifi-
"cance of this matter. It is always entitled to care-
"ful consideration and in doubtful cases will, as we
"have shown, often turn the scale; but when the
"meaning and scope of a constitutional provision are
"clear it cannot be overthrown by legislative action,

" although several times repeated and never before " challenged. It will be perceived that these stamp " duties have been in force during only three periods: " First, from 1797 to 1802; second, from 1862 to 1872; " and, third, commencing with the recent statute of " 1898. It must be borne in mind also in respect to " this matter that during the first period exports were " limited, and the amount of the stamp duty was " small, and that during the second period we are " passing through the stress of a great civil war or " endeavoring to carry its enormous debt; so that it " is not strange that the legislative action in this re- " spect passed unchallenged. Indeed, it is only of " late years, when the burdens of taxation are increas- " ing by reason of the great expenses of government, " that the objects and modes of taxation have become " a matter of special scrutiny. But the delay in pre- " senting these questions is no excuse for not giving " them full consideration and determining them in " accordance with the true meaning of the Constitu- " tion."[15]

His eighth theory is that " an act of Congress " imposing a tax directly upon all shares or certifi- " cates of stock in all corporations and associations " would be constitutional. *A fortiori*, is a law con- " stitutional which merely taxes the sale or agree- " ment to sell such property."

This theory rests upon his interpretation of the

[15] Fairbank vs. United States, 181 U. S., 311-312.

scope of the decision in the second Income Tax Case to the effect that a direct tax upon personal property must be a general assessment on all one's personal property. We do not agree to that. We maintain that a tax levied upon a particular kind of personal property is a direct tax just as much as if it were levied upon all personal property. We do admit that if Congress may tax directly without apportionment all shares or certificates of stock in all corporations and associations a tax upon the sale or agreement to sell such property is constitutional. We contend that none of the decisions of this Court sustain the right of Congress to levy a tax directly without apportionment upon shares or certificates of stock or any other property except with reference to either its production or its consumption. In the language of this Court in the case of Patton vs. Brady[16] all such taxes upon certain kinds of property have "reference to their origin or their intended use."

With this reply to the points which the Assistant Attorney-General has made in his brief on behalf of the Government I wish to add a few words in regard to my views as to what the true interpretation of the Constitution in this matter should be aside from the technical authority of the cases we have cited.

Prior to 1896, prior to the consideration of the Income Tax Cases by this Court, it seemed to be conceded in the able opinions of this Court that the only

[16] Patton vs. Brady, 184 U. S., 608.

direct taxes within the meaning of the Constitution were land taxes and capitation taxes. In all these prior decisions great stress was laid upon two things—the opinions of political economists and of the statesmen of the Revolution and the actual construction placed on the Constitution by Congress in its tax legislation. When the Income Tax Cases came before this Court all these sources of information and opinion as to what a "direct tax" was within the meaning the Constitution were fully canvassed and considered. But another thing was done which had not been done before and that was to make a study to determine what the original purpose of that clause in the Constitution had been. Not what political economists thought was meant by the Constitution at that time, not what Adam Smith thought or what Hamilton thought—these were all taken into account—but the thing of value which the Court decided was the ultimate object to be accomplished by that provision in the Constitution.

I think it is a perfectly fair statement to say that at the time that clause was put in the Constitution the only two taxes that the framers of that Constitution had definitely in mind—the only two taxes that they were safeguarding—were a land tax and a capitation tax. And the reason for that was very simple.

At that stage in the development of our country all great wealth was found in three forms. Real estate was one form. Land was valuable. Land was

highly prized. Slaves were another form of property which in the aggregate as a particular class of property was of immense value. Commerce was the remaining chief source of wealth—commerce and business. The accumulated or invested personal property was small in value and amount and it was not, therefore, the subject of the same anxiety and care and thought which was bestowed on the three chief forms of wealth.

The framers of the Constitution disposed of these three forms of wealth in regard to taxation in the following way: They gave interstate and foreign commerce to the Federal Government. They imposed the restriction that no tax could be laid upon exports. They allowed Congress to lay import duties. They provided that no State could without the consent of Congress lay taxes on imports or exports. Thus in the matter of taxation foreign commerce and interstate commerce were given to the Federal Government. They gave to Congress taxes upon business, taxes upon occupation, taxes upon consumption, and, in the development of modern life, taxes upon privileges that are not of the character of property. The right was given to Congress to levy excises upon them while the same right was reserved to the States.

The framers of the Constitution had a long struggle over the other two questions—the question of land and the question of slaves. The great land-

holding States did not propose to agree to a system of government which would enable the small land-holding States to levy a tax upon their land unless it were done by the rule of apportionment according to representation.

The slave-holding States did not propose to agree to a form of government based upon a system of representation according to population which would enable a majority of representatives from States where there were no slaves to levy a tax upon slaves unless the tax were laid in proportion to representation.

A compronise had to be made and the compromise made was expressed in two forms—positive and negative. I think the language is significant and if the Court will allow me I will read the positive form which occurs first in the Constitution.

"Representatives and direct taxes shall be appor-
" tioned among the several States which may be
" included within this Union, according to their
" respective numbers."

" Their respective numbers " did not mean the whole population. " Their respective numbers " meant all the free men plus three-fifths of the slaves. That was the basis of representation and the basis of apportionment of direct taxes. If that clause had stood alone—and that was the clause which was first adopted—the subsequent negative was put in afterwards—we would have been confronted with the broad question that direct taxes must be apportioned

and would have had no aid from the Constitution to fix upon one or two direct taxes.

But later they put in the following clause for additional certainty on the question of slaves:

"No capitation or other direct tax shall be laid, "unless in proportion to the census or enumeration "hereinbefore directed to be taken." They thus specified one tax as a direct tax—"no capitation or other direct tax."

The reason for this negative clause is very simple. The status of slaves was a matter of triplicate character. For purposes of representation they were regarded as persons. For all other purposes they were regarded as property. In some of the States they were declared by statute to be real property. In others they were held to be personal property. Therefore there appeared a necessity for specifying that no capitation tax should be laid except in proportion to the census although the subject had been in a broad sense covered by the previous declaration that direct taxes must be apportioned according to respective numbers.

I have admitted that doubtless the only other tax which the framers of the Constitution had clearly in mind was a land tax but if that was the only other tax that they meant to cover why did they not say in this second clause: "No capitation or *land* tax shall be laid, unless in proportion to the census?" They left the door open because in their minds the door

was intended to be open. They probably regarded a tax upon slaves, even where they were held as personal property, as a direct tax and did not propose to have it laid without apportionment. But they left the door open.

Down to 1896—as I read the decisions of this Court—continual and exclusive attention was paid in framing those decisions to two things: the opinions of political economists and statemen as to the meaning of a "direct tax" and the construction that had been placed upon this clause in the Constitution by Congress. All the direct taxes laid by Congress had been laid upon land and slaves. No other direct tax had been laid prior to the income tax of 1894.

The political economists had confused the subject, according to my view, so far as the Constitution of the United States was concerned by efforts to arrive at a philosophical determination of the meaning of a "direct tax." I do not think that can be done. Some men entertain contrary opinions. So far as the Constitution was concerned this Court until the Income Tax Cases came before it had never directed its attention to what the purpose of that clause in the Constitution had been—what the great object intended to be accomplished was.

In the Income Tax Cases the Court did define that purpose, that great aim, that great object, very clearly.

In the opinion delivered by Mr. Chief Justice

FULLER in the first Income Tax Case this language was used:

"The States were about, for all national purposes "embraced in the Constitution, to become one, united "under the same sovereign authority, and governed "by the same laws. But as they still retained their "jurisdiction over all persons and things within their "territorial limits, except where surrendered to the "general government or restrained by the Constitu- "tion, they were careful to see to it that taxation and "representation should go together."

That is not limited. Taxation and representation should go together "so that the sovereignty reserved "should not be impaired, and that when Congress, "and especially the House of Representatives, where "it was specifically provided that all revenue bills "must originate, voted a tax upon property, it should "be with the consciousness and under the responsi- "bility, *that in so doing the tax so voted would pro- "portionately fall upon the immediate constituents of "those who imposed it.*" [17]

Mr. Justice FIELD expressed the same purpose in similar language:

"On the one hand, anything like oppression or "undue advantage of any one State over the others "would be prevented by the apportionment of the "direct taxes among the States according to their "representation, and, on the other hand, anything

[17] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 556.

" like oppression or hardship in the levying of duties,
" imposts and excises would be avoided by the pro-
" vision that they should be uniform throughout the
" United States. This compromise was essential to
" the continued union and harmony of the States.
" *It protected every State from being controlled in its*
" *taxation by the superior numbers of one or more*
" *other States.*" [18]

Later in the same decision this Court defines even more clearly and tersely the rule that should guide it in the determination of what are and what are not direct taxes within the meaning of the Constitution. The language is:

" Nothing can be clearer than that what the Con-
" stitution intended to guard against was the exercise
" by the General Government of the power of *directly*
" *taxing persons and property within any State through*
" *a majority made up from other States.*"

Then the Court continues:

" It is true that the effect of requiring direct taxes
" to be apportioned among the States in proportion to
" their population is necessarily that the amount
" of taxes on the individual taxpayer in a State hav-
" ing the taxable subject matter to a larger extent in
" proportion to its population than another State has,
" would be less than in such other State, but this
" inequality must be held to have been contemplated
" and was manifestly designed to operate to restrain

[18] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 587.

" the exercise of the power of direct taxation to extraor-
" dinary emergencies and to prevent an attack upon
" accumulated property by mere force of numbers."[19]

Down to 1896 the decisions of this Court had dwelt upon the fact that at the time of the adoption of the Constitution the only taxes that were contemplated by the framers of the Constitution in their use of the phrase "direct" were taxes upon land and slaves. With the passage of the income tax law of 1894 however a new problem was presented to this Court which compelled the further investigation of of the purpose and ultimate object of that clause in the Constitution.

I do not think it needs very much argument to sustain the proposition that you could never pass through Congress a law laying an income tax apportioned among the States. The States have arrived at the point where many States have people with very great incomes and many other States have the same number of people with very small incomes. If you apportioned that tax it would have exactly the effect of placing a heavy burden of taxation upon the States where the people have small incomes and a light burden of taxation upon the States where they have large incomes in proportion to the population which would make the tax on the large incomes very small. In other words there would result an inequality in taxation which would be in favor of the

[19] Pollock vs. Farmers' Loan & Trust Co., 158 U. S., 583.

rich States and against the poor States. Practically, no such law will ever be passed by Congress.

When the matter was presented to this Court the Court was compelled to come to the conclusion that it was exactly that sort of taxation that was intended to be hit by that clause in the Constitution. Most people at the time of the adoption of the Constitution were looking out for land or looking out for slaves and had not stopped to think about incomes because they had none or because those they had were so small and evenly distributed that their taxation made no practical difference. But the Constitution was drawn in broad language. It did not say: "No capitation or land tax" but said: "No capitation or other direct tax." Therefore this Court held that a tax upon personal property or upon the income of real property or upon the income of personal property was a direct tax within the meaning of the Constitution.

There again I draw attention to the fact that this Court might have held that a tax upon personal property was a direct tax even if the question as to a tax upon income had not been before it. The Court however did not permit a direct tax to be laid upon personal property by the subterfuge of a tax upon income. It held: First, that a tax upon real estate was a direct tax and that a tax upon the income of real estate being indistinguishable from a tax upon real estate was likewise a direct tax. Second, that a tax upon personal property (not all one's personal

property but a tax upon personal property) was a direct tax; and that a tax upon the income of personal property being indistinguishable from a tax upon personal property was a subterfuge for a tax upon personal property and was therefore a direct tax.

It seems to me that it will be most unfortunate if in the necessary process of distinguishing direct and indirect taxes—the lines of which travel very closely together—that decision is weakened in any respect by subsequent interpretation.

Let me suggest a possibility of the present and of the future. When the South looked out for its slaves it had not foreseen the fact that in time to come it would have a product, grown only in the South, of perhaps greater value than all the slaves—cotton. Does any one suppose that the representatives of the Southern States in the Constitutional Convention, if they could have foreseen that fifty years later (by reason of the invention of the cotton gin and other circumstances) they were going to have a product of great value—of so great importance that it came to be said that "cotton is king"—does any one suppose that they would have left the door open for a majority made up in Congress from the North, where there is no cotton, to levy a tax upon cotton? It is inconceivable, to my mind, that they should have left such a door open.

To bring that argument right home to this very case: if the representatives of the North could have

foreseen the development in a century of the great volume of wealth in the rich States of the North and the East represented by shares and certificates of stock would they have left the door open for a majority in Congress made up from States where there are very few shares and certificates of stock to lay a tax without apportionment upon their shares or certificates of stock? I cannot conceive that such a thing could have been intended or permitted by them.

We maintain, therefore, that a tax upon land is a direct tax; that a tax upon personal property is a direct tax—not a tax upon all personal property but upon any personal property; that a tax upon cotton would be a direct tax; that a tax upon shares and certificates of stock would be a direct tax; and that a tax on the sales of shares or certificates of stock is nothing but a subterfuge—a subterfuge which has been uniformly and frequently repudiated by this Court—and that therefore as a matter of logical deduction from the decision of this Court in the second Income Tax Case combined with these decisions which have maintained that a tax on sales is a subterfuge there can be no escape from the conclusion that a tax on the sale of shares or certificates of stock is a direct tax and must be apportioned among the States according to population. The tax laid by the War Revenue Law in this case was not so apportioned and is therefore unconstitutional and void.

I thank the Court for its attention.